Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)	CG Docket No. 04-208

SPRINT REPLY COMMENTS

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Summary

The comments responding to the *Second Further Notice of Proposed Rulemaking* demonstrate wide support for some federal rules governing telecommunications billing. While some parties argue that the FCC need not impose rules other than those already established in the *First Report and Order*, and other parties argue that the FCC should establish detailed rules on all aspects of billing, almost all parties appear to support the fundamental concept that the FCC should exercise its authority to establish billing rules that would be uniformly applied nationwide.

Sprint supports the adoption of a single uniform set of federal rules and set forth a position which balances the various extremes contained within the comments. Sprint does not oppose the creation of any further billing requirements, for example, as do AT&T and Qwest. On the other hand, Sprint does not believe the FCC should attempt to dictate the specific line item labels and types of surcharges that carriers can impose, as suggested by NASUCA and the AARP. Sprint believes that the combination of the existing obligation to provide clear and non-misleading descriptions with the high level proposed rules regarding billing format and disclosure will provide a balanced regime that permits the benefits of competition to continue to accrue to consumers and will ensure appropriate consumer protections are maintained.

Once the FCC exercises its authority to establish these rules, however, it is imperative that the Commission preempt any inconsistent state regulation. Federal rules cannot simply be a floor upon which 50 different state commissions or legislatures can build. Inconsistent state regulation will undermine the benefits brought to consumers by national economies of scale and national pricing plans. Sprint disagrees with the legal arguments of the Attorney Generals regarding the FCC's authority to preempt state billing regulation. The FCC has the legal authority and the Congressional statutory directive to establish a national federal regime for wireless services.

Sprint also opposes the comments seeking reconsideration of the FCC's Order filed by the Attorneys General and the Arizona Corporation Commission. These petitions raise serious First Amendment concerns, are not supported by the facts, and, in the end, fail to explain how carriers, which operate under term contracts, should recover their costs of providing service. Under the Attorneys General application of the law, carriers would have two choices. The carrier could recover new government imposed costs by increasing its base rate on all new subscribers, thus requiring new customers to subsidize the existing base of subscribers for such expenses. Or, the carrier could abandon term contracts and increase rates for all customers. Even the latter solution, however, would ultimately require customers in one state to subsidize customers from other states that imposed fewer costs on carriers. Both alternatives harm consumers and limit consumer choices.

Ultimately customers must pay the cost of providing service, including costs imposed by the government through mandates or taxes on carriers. These costs do not simply disappear if the FCC prohibits the imposition of surcharges or limits the types of billing structures carriers use.

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SPRINT REPLY COMMENTS

Sprint Corporation, on behalf of its local, long distance and wireless divisions, submits the following reply to the comments filed in the above captioned rulemaking proceeding,[1] including opposition to the requests for reconsideration contained in the Comments of the Arizona Corporation Commission ("ACC") and the National Association of Attorneys General ("AGs").[2]

Although the commenting parties disagree on the level of regulation necessary, the majority of commenters support the establishment of some federal rules governing telecommunications billing. Sprint agrees with these commenters and urges the Commission to establish a single consistent federal regulatory regime. Sprint strikes a middle ground between the extreme

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1 *See Truth-in Billing and Billing Practices*, CC Docket No. 98-170, *National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CG Docket No. 04-206, *Second Further Notice of Proposed Rulemaking*, FCC 05-66, 20 FCC Rcd 6448 (March 10, 2005), *summarized in* 70 Fed. Reg. 30044 (May 25, 2005)("*Second FNPRM*").

2 Arizona Corporation Commission Comments at 2-5 ("The Commission Should Reconsider its Preemption of State Authority to Impose or Prohibit Line Items"); Comments of Attorneys General of the Undersigned States, through the National Association of Attorneys General at 7 ("AG Comments"). The AG Comments "urge . . . the Commission [to] reconsider its recent decision and prohibit the breakout of carrier add-on charges in telecommunications bills, other than taxes and regulatory fees." Although the AGs style their pleading as "Comments," they clearly seek reconsideration of the *NASUCA Declaratory Order*.

positions taken by various parties. Sprint does not oppose the FCC establishment of limited national rules regarding billing format and disclosure. These rules would be in addition to the existing obligations to provide clear and non-misleading descriptions on customer bills. Once these rules are established, however, it is imperative that these rules be applied in a uniform and consistent manner. Individual state rules would increase costs for consumers, undermine national pricing and limit innovation. To this end, the FCC must preempt state regulation which would threaten to use these federal rules as a floor rather than a ceiling.

The FCC must also reject the ACC and AG request that the FCC reverse its findings in the *Declaratory Ruling Order*. The Commission properly found that state regulation of CMRS rate levels and rate structures is prohibited by 47 U.S.C. §332(c)(3)(A). Moreover, the Commission has refrained from rate level and rate structure regulation of non-dominant wireline carriers for some 25 years. Neither the Arizona Commission nor the AGs have presented any argument as to why the Commission should cease its reliance on the competitive marketplace to ensure that such carriers meet their obligations under 47 U.S.C. §§ 201 and 202 and instead dictate to such carriers how they are to recover their costs of providing telecommunications services. Such intervention would not promote the public interest or benefit consumers.

I. THE COMMISSION SHOULD ESTABLISH NATIONAL RULES WHICH PROVIDE A FRAMEWORK FOR TELECOMMUNICATIONS BILLING

The vast majority of commenters agree that the FCC should establish federal rules governing telecommunications billing. Parties as diverse as the National Association of State Utility Consumer Advocates ("NASUCA"), the AARP, the Consumers Union, CTIA, and Cingular all suggest that the FCC establish federal rules of one kind or another. Verizon Wireless, for example, calls for a "national framework for wireless billing practices."[3] NASUCA also supports adoption of "nationally uniform standards" for wireless surcharges.[4] AT&T supports the Commission's proposal for a "uniform, nationwide, federal regime."[5] Even Qwest, which argues forcefully that carrier billing should be free from government interference except in the most extreme circumstances, acknowledges that it is the FCC's existing rules and interpretive guidance that "belie the need to regulate carrier billing practices further."[6]

Despite the general acknowledgement that federal rules are necessary, there is considerable difference of opinion regarding the level of regulation which needs to be imposed. Several parties suggest that the FCC's existing rules as established through the *First Report and Order*[7] are sufficient. Thus, AT&T argues that "[s]o long as carriers adhere to their duty to present their charges to customers in a non-misleading manner, there is no need to single out line item charges and related carrier sales practices."[8] Qwest similarly argues that if the FCC has concerns about carrier billing practices, it should act through enforcement proceedings, not additional rule making. "An enforcement approach makes the most sense given the fact that the Commission already regulates carrier billing practices."[9] Other parties, however, seek extensive rules addressing every aspect of carrier billing from the FCC. Thus, NASUCA and AARP support regulation at every level, including the types of surcharges that are to be permitted, the labels to be used, the

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3 Verizon Wireless Comments at 5.

4 NASUCA Comments at 14.

5 AT&T Comments at 14.

6 Qwest Comments at 3.

7 *In the Matter of Truth-in-Billing and Billing Format,* First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (1999)("*First Report and Order*").

8 AT&T Comments at 3.

9 Qwest Comments at 3.

percentage deviation that may occur when disclosing the level of surcharges and the standard of proof which must be met by a carrier.

Sprint takes a more measured approach to FCC regulation. While Sprint agrees with AT&T, BellSouth, Qwest, and Verizon that the existing obligations imposed on carriers pursuant to the *First Report and Order* provide the Commission with ample authority to pursue carriers that the FCC believes are acting improperly, Sprint does not oppose the imposition of certain limited additional national billing and disclosure obligations which the Commission believes will provide greater clarity to consumers.[10] Sprint must reject the equally extreme position of NASUCA, however, which would harm consumers by reducing competition and eliminating national economies of scale. NASUCA's position additionally raises numerous legal concerns and would subject the Commission to potential reversal on appeal. Most importantly, NASUCA's position would limit options for consumers, restrict innovation and increase consumer rates.

A. SPRINT'S PROPOSED REGULATORY FRAMEWORK

While Sprint rejects NASUCA's more extreme positions, Sprint agrees with NASUCA, as well as many other commenters, that telecommunications surcharges should be separated between mandatory and non-mandatory categories. Indeed, many carriers, such as Sprint PCS, already segregate charges in this manner. Sprint further agrees with NASUCA that the Commission should use the narrow definition of mandatory surcharges adopted by the Assurance of Voluntary Compliance ("AVC"). Finally, Sprint agrees that full disclosure of terms and conditions

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10 Sprint notes, however, that any billing structure requirements adopted in this proceeding must be made part of the regulatory structure ultimately adopted for all services, including IP-enabled services.

should be made available at the point of sale in the manner described within the AVC.[11] These obligations, combined with the requirements imposed by the *Fist Report and Order* and the *Declaratory Ruling Order* – that all charges be clearly labeled and non-misleading – establish a framework that ensures that the needs of consumers are met, but which leaves carriers sufficient flexibility to establish rate structures that correspond with their individual circumstances and the ever changing market.

This basic structure is, moreover, consistent with the AVC which certain wireless carriers, including Sprint PCS, negotiated with the Attorneys General of 32 states,[12] and which the AGs have acknowledged provide significant benefits to consumers. The AGs and the participating wireless carriers entered the AVC, in part, "to avoid the cost and inconvenience to [the wireless] Carrier that will result if the Participating States subject [the wireless] Carrier to different advertising and business requirements in each Participating State." [13] At least at that time, the AGs were in agreement that the AVC addressed the concerns of consumers and established the appropriate balance between state interference in wireless operations and consumer protection.

The Attorneys General made clear that the new "AVC rules" will provide the information and terms that consumers need to comparison shop. For example, the Illinois Attorney General, one of the lead AGs, stated that the AVC will mean "millions of Verizon Wireless, Cingular Wireless and Sprint PCS customers will be provided with complete and accurate information

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11 As discussed below, Sprint does not support NASUCA or the AARP's call for disclosure requirements greater than those contained in the AVC.

12 The original 32 participating states are: Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Wyoming. Kentucky joined the AVC in 2005.

13 AVC at ¶ 8.

necessary to make an informed choice about which plan best suits their needs."[14] The Tennessee Attorney General, another lead negotiator, stated that the AVC will give consumers "all the information they need to determine which plan and wireless carrier is best for their individual needs."[15] Other AG statements concerning the AVC include:

- "This settlement establishes a model for clear and truthful advertising practices in the fast-growing wireless telephone industry. . . . We are pleased that these carriers are taking this important step to improve their marketing practices and customers' service for the benefit of millions of consumers."[16]
- "It's important for Michigan consumers to be able to comparison shop for good deals and make informed decisions when purchasing services. Under this settlement, these companies have taken steps that will give new cell phone customers easy to understand information about cellular plans and allow them to cancel their contract without paying hefty early termination fees."[17]
- "What we are requiring is that wireless phone companies be straightforward and clear in providing information that consumers need to make the choice that is right for them and their families."[18]
- "Consumers deserve clear information about the services they receive and should not be subjected to unexplained costs or hidden fees."[19]

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14 Illinois Attorney General Press Release, *Verizon Wireless, Cingular Wireless and Sprint PCS Agree to More Accurate Maps, Pro-Consumer Return Policies* (July 21, 2004) *See also* National Association of Attorneys General Press Release, *Settlement: Thirty-Two Attorneys General Settle with Verizon, Cingular, and Sprint PCS* (July 22, 2004).

15 Tennessee Attorney General Press Release, *Thirty-Two Attorneys General Reach Agreements With Three Major Wireless Carriers* (July 21, 2004).

16 Colorado Attorney General Press Release, *Attorneys General Settle Wireless Advertising Claims with Verizon, Cingular and Sprint PCS* (July 21, 2004).

17 Michigan Attorney General Press Release, *Cox Announces Multistate Settlement Over Cellular Companies' Advertising Practices* (July 22, 2004).

18 Alabama Attorney General Press Release, *A.G. Kind Announces Settlement with Three Wireless Carriers: Cingular, Sprint PCS, Verizon to Give Consumers More Information, Trial Periods* (July 22, 2004).

19 Ohio Attorney General Press Release, *Thirty-Two Attorneys General Settle Claims Against Three Wireless Carriers; Verizon, Cingular and Sprint PCS Agree to Pro-Consumer Return Policies* (July 23, 2004).

- "This agreement will draw Arkansans a clear picture of what they are agreeing to when they sign a wireless-service contract with these providers."[20]

Consumer groups similarly applauded the AVC. The director of one group stated, "This settlement will result in significant improvements for customers. . . ."[21] NASUCA stated that the AVC "should serve as a template for enforceable rules throughout the industry":

> The voluntary agreement is a significant first step that should be used to develop safeguards that protect customers of all wireless companies in every state.[22]

Sprint respectfully submits that the additional obligations regarding separate sections on bills for mandatory and non-mandatory surcharges, a strict definition of the meaning of the term "mandatory," and mandatory disclosure of surcharges at the point of sale, when combined with the already established obligation to provide clear and non-misleading labels, satisfies the professed concerns of the AGs about "alleged" consumer confusion and the need to present consumers sufficient information to enable them to compare services offered by carriers. Indeed, this proposed national structure for telecommunications billing is similar to the AVC structure agreed to by a majority of the Attorneys General and strikes an appropriate balance between consumer protection and carrier flexibility.

B. THE COMMISSION SHOULD REJECT CALLS FOR ADDITIONAL REGULATION

NASUCA argues that the Commission should establish additional rules and proscriptions on carrier surcharges and billing practices. For example, NASUCA argues that the Commission should establish a national surcharge structure and dictate to carriers the labels used for such

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20 Arkansas Attorney General Press Release, *Attorney General Mike Beebe Announces Settlement with Three Wireless Carriers; Cingular, Print PCS, Verizon Agree to Give Consumers More Information, Improve Coverage Maps, Allow Trial Use of Services* (July 21, 2004).

21 Consumers Union Press Release, *Cell Phone Settlement Encouraging for Consumers* (July 21, 2004). *See also* COMMUNICATIONS DAILY (July 23, 2004).

22 NASUCA Press Release, *Nation's Advocates Propose Wireless Consumer Protections* (Nov. 24, 2004).

charges. NASUCA also advocates a Commission rule which would prohibit carriers from combining more than one cost into a single surcharge. Establishing a single national rate structure and mandating the specific costs that carriers could recover in one surcharge, however, ignores the differences in each carrier's cost profiles and the vagaries of state imposed costs. Such a rule would also infringe First Amendment rights and undermine the ability of carriers to compete, which in turn harms consumers by increasing prices and reducing choice. Most importantly, however, it ignores the fundamental point that surcharges are entirely legal and an appropriate form of rate structure. As the Commission emphasized in the *Declaratory Ruling Order* "[t]here is no general prohibition against the use of line items on telephone bills under our [Truth-in-Billing] rules or the [Communications] Act," and that "nothing in the *Truth-in-Billing Order* prohibits carriers from using non-misleading line items."[23]

How a carrier decides to recover the traffic sensitive costs it incurs in the actual provision of service; the non-traffic sensitive costs imposed by other carriers (*e.g.,* PICC charges) and the costs incurred in meeting obligations imposed by various government institutions (*e.g.,* gross receipts taxes, federal and state universal service contributions) are questions of rate structure. The Commission has for the last quarter century, starting with its decision in the *Competitive Carrier Rulemaking*, 85 FCC 2d 1 (1980), eschewed answering such questions for non-dominant carriers operating in intensively competitive markets – and there can be no dispute that the wireless and interexchange markets are intensely competitive – and has instead relied upon competition to ensure that such carriers' rate structures were reasonable and non-discriminatory:

> [I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set

23 *Declaratory Ruling Order* at ¶23.

> by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs.[24]

There has been no market failure during this quarter century and Congress endorsed the Commission's policy of relying upon the competitive marketplace to ensure that carriers meet their Title II obligations in the 1996 Act. In short, for the Commission to mandate a particular rate structure as requested by NASUCA is totally unjustified. NASUCA's arguments, and those of the AGs, display a deep mistrust of the competitive marketplace, despite the fact that competitive carriers cannot exercise market power to the detriment of consumers. These arguments, however, run contrary to the basic economic principle that consumer welfare is maximized through competition. They also ignore the historical evidence before the Commission that competition has brought tremendous innovation and dramatically falling prices for consumers.

NASUCA also advocates a Commission rule which would prohibit carriers from combing more than one cost into a single surcharge. NASUCA argues that "[l]ump sum charges . . . hinder rather than help consumer efforts to make accurate comparisons among different carriers."[25] First, it must be noted that this argument is inconsistent with NASUCA's previous position that all costs should be contained in a single rate. More importantly, however, the argument once again ignores the fact that the Commission has already held that surcharges are permissible and that carriers need the flexibility to design rate structures that accommodate diverse circumstances and products. It also presumes that carriers will violate the obligations already imposed – the obligation to use clear and non-misleading descriptions of it charges. If, in addition to this

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24 *Second CMRS Order,* 9 FCC Rcd 1411, 1478 ¶ 173 (1994). *See also id.* at 1479 ¶ 178 ("Even permitting the filing of tariffs, in the case of non-dominant carriers in competitive markets, is not in the public interest. . . . [I]n a competitive environment, requiring tariff filings can inhibit competition. Indeed, even permitting voluntary filings would create a risk that competitors would file their rates merely to send price signals and thereby manipulate price.").

25 NASUCA Comments at 21.

general obligation, carriers were required to segregate mandated and non-mandated charges and disclose surcharges at the point of sale, it is unclear how consumers would be misled.

Finally, the Commission should reject NASUCA and the AARP's call for disclosure rules which exceed the framework established by the AVC rules. These groups advocate a requirement that would supplement the AVC by requiring carriers to disclose at the time of sale an estimate of all surcharges within 10 percent. NASUCA and the AARP also urge the Commission to extend the disclosure requirements of the AVC to apply to third party retailers and extend the AVC policy of return rights to 45 days after the receipt of a bill. Sprint strongly opposes the suggestion that the AVC framework be so extensively expanded. The agreement negotiated with the Attorneys General struck an important balance between the need to allow carriers flexibility in responding to the market place and ensuring that customers receive necessary information.

The AVC's disclosure requirements differ depending on whether a surcharge is national ("without regard to locale") or local in scope. For national surcharges, the carrier must disclose the "name or type and amount (or, if applicable, a percentage formula as of a stated effective date)."[26] For surcharges applied locally, the carrier must "clearly and conspicuously" disclose that additional monthly fees will apply and disclose the "full possible range of total amounts (or percentage) or the maximum possible total amount (or percentage) of such additional monthly discretionary charges."[27] These disclosures provide consumers with the information necessary to make informed decisions without causing carriers to incur unnecessary costs or providing additional and frequently unwanted information to consumers. Indeed, as AT&T observes, significant disclosure obligations can result in the irritation of customers. "[I]t is predictable that a sig-

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26 AVC at ¶ 18(l).

27 *Id.*

nificant number of customers may abandon placing an order rather than be bombarded with undesired detailed disclosures."[28]

As Verizon Wireless observes, the terms of the AVC "make sense" because national surcharges do not vary by individual jurisdiction, while local surcharges vary dramatically from one locality to another.[29] In addition, the agreement of 32 Attorneys General to this "range of surcharge" approach confirms that the chief enforcement officers of these States believe that the approach protects consumers and gives them the information they need to make informed decisions.

Sprint respectfully disagrees with the Commission's suggestion that providing consumers with "a wide range of potential surcharges at the point of sale could be misleading."[30] As Cingular explains, under the approach adopted in the AVC, "the customer can assess not only the lowest possible cost for service, but also (most importantly), the highest possible cost":

> Where a consumer is apprised of the highest potential charges associated with his or her telecommunications service, it cannot be said that the consumer was mislead.[31]

The Commission's inquiry concerning a "hard factor" in order to determine whether surcharge estimates are misleading – for example, NASUCA's suggestion that estimates would be deemed misleading if not within 10 percent of actual surcharges – is not workable in the real world, given the number of surcharges that must be imposed in certain jurisdictions. As Verizon Wireless explains, the systems required to estimate any particular customer's bill are "costly and

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28 AT&T Comments at 13.

29 *See* Verizon Wireless Comments at 46.

30 *Second FNPRM* at ¶ 55.

31 Cingular Comments at 56.

complex."[32] In addition, hard estimates are often impossible to provide because surcharge levels may depend on details such as the type of services ordered and the applicable billing cycle.[33]

The AVC provisions are relatively new. The Commission should allow time so it and industry can see through experience whether the AVC approach meets customer needs. If the approach does not work as expected, the Commission can make appropriate refinements on a national scale. It is appropriate, however, for the Commission to take incremental steps in an area that may have significant cost impacts on carriers – and by extension consumers.

II. THE FCC SHOULD PREEMPT STATE REGULATION INCONSISTENT WITH ITS NATIONAL BILLING RULES

Once the Commission has established a uniform national framework for telecommunications billing, it should preempt all inconsistent state regulation. As discussed in Sprint's initial Comments, state-by-state regulation will undermine the national economies of scale and national pricing plans that have been a tremendous boon to consumers and a significant source of the success of the wireless industry. Consumers have directly benefited from the Commission's deregulatory polices with new technologies, innovative products and dramatically falling prices. The existence of multiple state obligations would substantially undermine these consumer benefits and should be prevented. Despite the suggestions of some State commenters, the FCC has the legal authority to exercise preemption in this area, particularly with regard to wireless carriers.

The Attorneys General ask the FCC to "reconsider" its preemption analysis concerning State billing and disclosure requirements.[34] Specifically, the AGs contend that "States are not preempted from regulation and enforcement of billing practices":

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32 Verizon Wireless Comments at 46.

33 *Id.* at 47-48.

34 *See* AG Comments at 5.

> Congress neither intended such preemption, nor authorized the Commission to preempt the states. Instead, Congress made clear its intent to preempt the states only in the narrow area of regulation of rates and market entry of wireless carriers . . . . State enforcement of . . . regulations or laws that specifically preclude identified [billing or disclosure] practices do not conflict with Congress' intent.[35]

In making their request, however, the AGs notably make no attempt to challenge the Commission's conclusion that "state regulation prohibiting or requiring CMRS line items constitutes preempted rate regulation."[36] The AGs thus appear to concede that, under the express preemption provision in Section 332(c)(3) of the Act, States may not prohibit or otherwise regulate any wireless carrier surcharges.[37]

Sprint demonstrates below that the preemption analysis that the AGs present is flawed and that the Commission has ample authority – and in the case of wireless service, *the Congressional directive* – to preempt State billing and disclosure laws that obstruct or frustrate federal policies.

A. States Have No Authority to Regulate the Billing and Disclosure Practices Pertaining to Interstate Telecommunications Services

Congress in the Communications Act of 1934 established a system of "dual state and federal regulation" over telecommunications – "one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction."[38] Specifically, in Section 2(a) of the Act, Congress charged the FCC with regulating "*all* interstate and foreign communication by wire or radio,"

35 *Id.* at 5 and 13.

36 *NASUCA Declaratory Order,* 20 FCC Rcd 7448 at ¶¶ 31-32.

37 Verizon Wireless documents several State billing laws that purport to address billing issues but actually constitute rate regulation expressly prohibited by Section 332(c)(3). *See* Verizon Wireless Comments at 18-20.

38 *Louisiana Public Service Comm'n* v. *FCC,* 476 U.S. 355, 360 (1986).

while Section 2(b) specifies that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communications service."[39] Federal courts have uniformly held that the FCC has "exclusive jurisdiction" over interstate communications and that as a result, "states are precluded from acting in this area."[40] The Commission long ago reached the same conclusion: "The States do not have jurisdiction over interstate communications."[41]

For example, at issue in *Operator Services Providers of America*, 6 FCC Rcd 4476 (1991) was whether a State possessed the authority to regulate the provision of interstate operator services. The FCC held that States lacked such authority, concluding that "the Communications Act precludes application of the Tennessee statute to interstate operator services":

> Under the Supremacy Clause, state action may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation. State requirements in such cases are invalid even if the state laws are not inconsistent with federal law. . . . The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority, Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state.[42]

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39 47 U.S.C. §§ 152(a) and (b)(emphasis added). *See also* § 151 (FCC was formed for "the purpose of regulating interstate and foreign commerce in communication by wire and radio.").

40 *Ivy Broadcasting* v. *AT&T,* 391 F.2d 486, 491 (2d Cir. 1968). *See also Crockett Telephone* v. *FCC*, 963 F.2d 1564, 1565 (D.C. Cir. 1992); *New York Telephone* v. *FCC,* 831 F.2d 1059, 1064-66 (2d Cir. 1980); *North Carolina Utilities Comm'n* v. *FCC*, 552 F.3d 1036, 1050 (4th Cir.), *cert. denied,* 434 U.S. 874 (1977); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978); *Vaigneur* v. *Western Union,* 34 F. Supp. 92, 93 (E.D. Tenn. 1940)("The effect of the [Communications Act] is to bring all interstate communications under [its] coverage to the exclusion of local statutes or decisions.").

41 *AT&T*, 56 F.C.C.2d 14, 20 ¶ 21 (1975), *aff'd California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978). *See also 2003 TCPA Order*, 18 FCC Rcd 14014, 14064 ¶ 83 (2003)("[S]tates traditionally have had jurisdiction over only intrastate calls.").

42 *Operator Services Providers of America*, 6 FCC Rcd at 4476-77 ¶¶ 9-10 and 12.

The AGs would have the Commission believe that the FCC's exclusive authority over interstate telecommunications is limited to rates and that as a result, States may still regulate the billing and disclosure practices concerning interstate services.[43] This argument, however, cannot be squared with the plain language of the Communications Act. Consistent with Section 2(a) of the Act,[44] Section 201(b) applies broadly to "[*a*]*ll* charges, practices, classifications, and regulations for and in connection with such communications service."[45] Similarly, Section 202(a) applies broadly to "*any* unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services or in connection with like communications service."[46] As the Commission has declared, "Congress [has] *deprived* the states of authority to regulate the rates *or other terms and conditions* under which interstate communications service may be offered in a state."[47]

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43 *See* AG Comments at 25 ("Sections 201(b) and 202(a) . . . set forth the requirement that rates be just and reasonable, and that carriers not establish discriminatory rates or give preferences to any class of customers. Because states' regulation of billing practices does not address the reasonableness of rates, or carrier discriminatory or preferential rate practices, . . . these sections . . . have no preemptive effect.").

44 *See* 47 U.S.C. § 152(a)("The provisions of this chapter apply to *all* interstate and foreign communication by wire or radio . . . and to *all* persons engaged within the United States in such communication.")(emphasis added). *See also id.* at § 151 (FCC is established for the "purpose of regulating interstate and foreign commerce in communication by wire and radio . . . [and is] grant[ed] additional authority with respect to interstate and foreign commerce in wire and radio communication.").

45 *Id.* at § 201(b)(emphasis added).

46 *Id.* at 202(a)(emphasis added).

47 *Operator Services Providers of America*, 6 FCC Rcd at 4477 ¶ 10 (emphasis added). *See also id.* at ¶ 12 ("The Tennessee statute seeks broadly to establish *the terms and conditions* under which interstate operator services may be offered in the states--establishing specific requirements for OSPs before they complete interstate calls. The Tennessee statute thus seeks to exercise one of the fundamental functions *exclusively* assigned to this Commission under the Communications Act, namely to assure the reasonableness of the rates, terms, and conditions, of interstate communications service.")(emphasis added).

The AGs additionally contend that States have authority to apply their billing and disclosure laws to interstate services pursuant to general savings clauses such as Section 414 of the Communications Act.[48] However, the Commission has already rejected this very argument in response to a State assertion that they possess authority to regulate interstate communications to "protect consumers against unfair, deceptive and fraudulent practices of interstate carriers":

> Section 414 of the Act does not alter the grant of plenary authority to the Commission over interstate communications. Section 414 of the Act preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation – remedies generally applicable to all corporations operating in the state, not just telecommunications carriers. Only Section 2(b)(1) of the Act limits the authority of the Commission, and that section reserves to the state authority over intrastate communications, not interstate communications.[49]

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[48] *See* AG Comments at 16. *See also* 47 U.S.C. § 414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this chapter are in addition to such remedies."). It is important to note that the Supreme Court has "repeatedly 'declined to give broad effect to saving clauses.'" *Geier* v. *American Honda Motor,* 529 U.S. 861, 870 (2000), *quoting U.S.* v. *Locke,* 529 U.S. 89 (2000).

[49] *Operator Services Providers of America*, 6 FCC Rcd at 4476-77 ¶¶ 8 and 11. *See also AT&T* v. *Central Office Telephone,* 524 U.S. 214, 227-28 (1998)(Section 414 "preserves only those rights that are not inconsistent with [federal law]. . . . In other words, the [Communications] act cannot be held to destroy itself."); *Bastien* v. *AT&T Wireless,* 205 F.3d 983, 987 (7^{th} Cir. 2000)("To read [Section 414] expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create."); *Wireless Consumers Alliance,* 15 FCC Rcd 17021, 17040 ¶ 37 (2000)("Section 414 . . . cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act."); *Midwestern Rely*, 69 F.C.C.2d 409, 4127 n.25 (1978)(Section 414 "preserve[s] actions based on breach of contract for matters *not* modified by the Act, . . . Section 414 does *not* give rise to [state] actions based on pre-existing duties *which have been modified by the Act.*")(emphasis added); *Richmond Brothers Records* v. *Sprint*, 10 FCC Rcd 13639, 13642 ¶ 15 (1995)(Section 414 does "not, however, permit all possible state causes of action to proceed as if federal regulation of communications did not exist."); *Lowest Unit Charge Requirements,* 6 FCC Rd 7511, 7513 ¶ 20 (1991) (Section 414 does "not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.").

In summary, to the extent that States possess any authority to regulate the billing and disclosure practices of telecommunications carriers, that State authority is at most limited to intrastate telecommunications services and does not apply to interstate services.[50]

B. CONGRESS HAS DIRECTED THE FCC TO ESTABLISH A "FEDERAL REGULATORY FRAMEWORK" FOR CMRS AND TO PREEMPT STATE REGULATION THAT FRUSTRATES THIS FEDERAL FRAMEWORK

As noted above, the Attorneys General do not challenge the Commission's ruling that Section 332(c)(3) expressly preempts States from prohibiting or otherwise regulating wireless carrier surcharges.[51] Nevertheless, citing to the House Report of the 1993 Budget Act, the AGs state that Section 332(c)(3) "preserves" State authority over the "other terms and conditions" of wireless service."[52] The AGs additionally assert that given this reservation of State authority, the FCC has been given "neither a mandate to supplant the States' role, nor the resources to step in the ensuing breach":

> The 1934 Act maintained the dual regulatory framework in section 332(c), and reinforced the states' important role in protecting consumers and ensuring reason-

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50 *See* 47 U.S.C. § 152(b).

51 Although the FCC "consistently has interpreted the rate regulation provision of [Section 332(c)(3)] to be *broad in scope*," *NASUCA Declaratory Order*, 20 FCC Rcd 6448 at ¶ 30 (emphasis added), the AGs repeatedly assert that this preemption provision should be interpreted narrowly. *See* AG Comments at 15 (twice), 16 (twice), 17 (twice), 18 and 20. In fact, the broad scope of the express rate preemption provision is apparent from the plain language of the statute. Section 332(c)(3) bars states from "any regulation" of wireless rates. The word, regulate, is defined as "bring[ing] under the control of law or constituted authority." WEBSTER'S NEW COLLEGIATE DICTIONARY (G.& C. Merriam Co. 1981). *See also* BLACK'S LAW DICTIONARY at 668 (abridged 5th ed., 1983)(Regulate defined to include "to subject to governing principles or laws."). Thus, any State attempt to limit or otherwise control wireless surcharges necessarily constitutes State activity that Section 332(c)(3) expressly preempts. *See also Bastien* v. *AT&T Wireless Services*, 205 F.3d 983, 986 (7th Cir. 2000)("[T]here can be no doubt that Congress intended complete preemption" over the regulation of wireless service rates and entry.").

52 AG Comments at 16-17.

able terms and conditions of all telecommunications services, including wireless.[53]

The AGs are correct that Section 332(c)(3) does not expressly preempt State regulation of the "other terms and conditions" of wireless service. But it is incorrect to suggest that Section 332(c)(3) "maintains the dual regulatory framework" of the 1934 Act, when Congress in the 1993 Budget Act *expanded* FCC regulatory authority for wireless services to include *intrastate* wireless services.[54] In fact, Congress "significantly changed the regulatory framework for CMRS" in the 1993 Budget Act.[55] Thus, for example, under Sections 2(b) and 332(c) as amended in 1993, the FCC and the States now share *concurrent* jurisdiction over the "other terms and conditions" of *intrastate* wireless service.

The AGs are also mistaken in suggesting that the "other terms and conditions" clause insulates State "other terms and conditions" regulations from preemption.[56] As a general matter, agencies like the FCC have the power to preempt even without an "explicit congressional authorization to displace state law."[57] Here, however, Congress made explicitly clear that the FCC

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53 *Id.* at 24 and 26.

54 Congress did so by amending Section 2(b) of the Act – the statutory source for all state authority over telecommunications carriers. As the FCC later explained, "in the 1993 Budget Act, Congress also added an exception to section 2(b) of the Communications Act. Section 2(b) generally reserves to the states jurisdiction over intrastate communication service by wire or radio of any carrier. The 1993 Budget Act amended section 2(b) to exempt section 332 from its provisions." *Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

55 *Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

56 The AGs additional reliance on Section 253(b) (*see* AG Comments at 16) is perplexing, given that Section 253(e) explicitly exempts Section 332(c)(3) from its scope. *See* 47 U.S.C. § 253(e)("Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile services providers.").

57 *City of New York* v. *FCC,* 486 U.S. 56, 63-64 (1988)(An agency "acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."). *See also Geier* v. *American Honda Motor,* 529 U.S. 861, 869 (2000)("[T]he savings clause (like the ex-

was not prohibited from preempting State "other terms and conditions" regulation. Section 332(c)(3) states unequivocally that "*this paragraph* shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[58] Thus, while Section 332(c)(3) does not itself preempt State regulation of "other terms and conditions," neither does it bar the FCC from preempting such State regulation under its general implied (or conflicts) preemption authority.[59] Indeed, the Commission explicitly recognized in implementing the 1993 Budget Act that it possesses the authority to preempt State regulation of "other terms and conditions" if the State regulation "thwarts or impedes a valid Federal policy."[60]

The AGs are also mistaken in asserting that the FCC does "not have a mandate to supplant" State regulation of the "other terms and conditions of wireless service. In fact, Congress has charged the FCC with establishing "a Federal regulatory framework to govern the offering of all commercial mobile services."[61] Congress deemed a national framework necessary to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[62]

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press pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.")(emphasis in original).

58 47 U.S.C. § 332(c)(3)(A)(emphasis added). In addition, the very legislative history that the AGs rely upon (see Comments at 17) explicitly states that "nothing *here* [*i.e.,* § 332(c)(3)] shall preclude a state from regulating the other terms and conditions of commercial mobile service." H.R. REP. NO. 103-111, 103d Cong., 1st Sess., at 261 (1993)(emphasis added)

59 In contrast, other provisions of the Act are expressly designed to preserve State authority from preemption by the FCC more broadly. *See, e.g.,* CTIA Comments at 43 (citing § 227(e)(1) and § 532(g)); Nextel Comments at 22-23 (citing § 332(c)(7)).

60 *Second CMRS Order,* 9 FCC Rcd 1411, 1506 nn. 515, 517 (1994).

61 H.R. CONF. REP. NO. 103-213, 103d Cong., 1st Sess., at 490 (1993).

62 H.R. REP. NO. 103-111, 103d Cong., 1st Sess., at 260 (1993).

In addition, not only did Congress direct the FCC to establish a "Federal regulatory regime" for CMRS, but it also expected that the FCC would establish appropriate level of regulation for the CMRS industry and that it would rely on the forces of competition to the maximum extent possible. As the Commission explained in implementing the 1993 amendments, Congress wanted to "ensure than an appropriate level of regulation be established and administered for CMRS providers":

> Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace. * * * [W]e establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers.[63]

Congress additionally directed the Commission to decide which of "the more than 20 statutory provisions governing common carriers ought to apply to wireless carriers," further mandating that the FCC "base its decisions on review of 'competitive market conditions.'"[64] Thus, as the Commission has recognized, "[i]n place of traditional public utility regulation, the 1993 Budget Act sought to establish a *competitive nationwide market* for [CMRS] with limited regulation."[65]

The Commission has established rules concerning wireless billing practices and it may establish additional billing and disclosure rules in this proceeding. The rules the Commission adopts apply to all wireless services, both interstate and intrastate. Any supplemental billing and disclosure laws or regulations that a State may adopt necessarily would conflict with the Congressional directive that the FCC establish for wireless services a "Federal regulatory framework" with the "appropriate level of regulation." As one commenter correctly observes, "state-

63 *Second CMRS Order,* 9 FCC Rcd at 1418 ¶¶ 14-15.

64 Nextel Comments at 21. *See also* 47 U.S.C. § 332(c)(1)(A) and (C).

65 *Unified Intercarrier Compensation NPRM,* 16 FCC Rcd at 9640 ¶ 84 (emphasis added).

by-state regulation of these wireless [billing and disclosure] practices by its very nature does violence to the congressional goals of uniformity and deregulation for the wireless industry":

> Even facially consistent regulations can impede uniformity and deregulation by the simple fact that a web of state laws will govern billing practices and be subject to inherently variable implementation.[66]

The wireless market has undergone a radical transformation since the 1993 Budget Act was enacted. At the time, customers had a choice of at most two carriers and the market was "less than fully competitive;"[67] in 1993, wireless was an "elite or niche service," it was used by "only 16 million people," it was "primarily a local service," and this "local service was expensive."[68] Today, in stark contrast, the wireless market is "the poster child for competition," and wireless has become "a more national service," where the average price per minute is about 10 cents, a 13% reduction from the previous year alone.[69]

This "amazing story" has been achieved in large measure due to the FCC's policies of forbearance and reliance on market forces, and because wireless carriers have been subject to "a

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66 Verizon Wireless Comments at 22-23. Because Congress has charged the FCC with establishing the "appropriate level of regulation" of wireless carriers, there is no need as the AGs suggest for the FCC to conduct a state law-by-state law analysis before exercising its conflicts preemption authority. *See* AG Comments at 24.

67 *First Annual CMRS Competition Report*, 10 FCC Rcd 8844, 8845 ¶ 4 (1995). *See also id.* at 8866 ¶ 65 (Cellular is "not the model of perfect competition. The DoJ has found little competition."); *id.* at 8853 ¶ 28 ("Cellular is generally a highly profitable business."); *id.* at 8871 ¶ 81 ("Many firms . . . are earning economic rents of significant proportions.").

68 *See* Presentation of Commissioner Kevin J. Martin, *Wireless and Broadband: Trends and Challenges,* Dow Lohnes-Comm Daily Speaker Series, at 1-2 and 6 (Oct. 14, 2004)("Martin Dow Lohnes Presentation"). A decade ago, some carriers offered a local calling area "as large as a whole state," although this was "the exception not the rule. . . . [T]he vast major of mobile radio services are provided in local and metropolitan geographic markets." *First Annual CMRS Competition Report,* 10 FCC Rcd at 8855 ¶ 64.

69 *See,* Martin Dow Lohnes Presentation at 6-7.

consistent regulatory treatment throughout the country."[70] As Chairman Martin has noted, this consistent national treatment has allowed wireless carriers to develop "uniform service plans, customer service training, billing systems, and 'back office' management tools."[71] This, in turn, has enabled wireless carriers to develop and use their "economies of scale and scope to offer lower costs to more consumers."[72]

State-by-state regulation of regulation of wireless billing and disclosure practices would destroy the vast economies of scale that the wireless industry was able to develop under a "Federal framework" because carriers would be required to tailor their national practices on a state-by-state basis.[73] Billing and other systems would have to be modified to account for unique legal requirements in each State. Thousands of sales and customer service employees would need to be trained to understand the nuances of different state regulation. The price of service certainly will increase by balkanized State regulation – both in States that impose additional regulations and in other States (because of economies of scale resulting from uniform operations would now be realized in fewer States). And, the continued ability of carriers to design, market, sell and provision national services and plans without regard to state borders – plans that America consumers have made clear they want – would be put at grave risk.

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70 *Id.* at 6.

71 *Id.*

72 *Id.*

73 The AGs do not dispute that wireless carriers would lose economies of scale from state-by-state regulation and that rates would increase as a result. *See* AG Comments at 18. Their position instead is that each state should decide for itself whether its residents should pay higher rates from increased regulation. This position, however, is flatly inconsistent with the "Federal regulatory framework" that Congress has charged the FCC to establish. This AG position also ignores the "ripple effects" of state regulation (regulation imposed in one state impact customers in other states. *See* Thomas W. Hazlett, *Is Federal Preemption Efficient In Cellular Phone Regulation?*, 56 Fed. Com. L.J. 155 (Dec. 2003).

In summary, this Commission has both the authority and the Congressional mandate to preempt all State billing and disclosure laws applicable to wireless services.

III. THE ACC AND AG REQUESTS FOR RECONSIDERATION SHOULD BE DENIED

The Commission in its *NASUCA Declaratory Order* "den[ied]" NASUCA's request that it "prohibit[] telecommunications carriers from imposing any line items or charges that have not been authorized or mandated by the government":

> There is no general prohibition against the use of line items on telephone bills under our rules or the Act. . . . Nor do we believe there is any basis to conclude that such a practice is "unreasonable" under section 201(b). . . . [T]he provision of accurate and non-misleading [surcharge] information on a telephone bill may be useful information to the consumer in better understanding the charges associated with their service and making informed cost comparisons between carriers.[74]

The AGs and the ACC now "urge . . . the Commission [to] reconsider its recent decision and prohibit the breakout of carrier add-on charges in telecommunications bills, other than taxes and regulatory fees."[75] According to the AGs, use of any surcharge other than "government mandated" surcharges, is "inherently confusing and misleading."[76]

The AG arguments ignore the obligations imposed on carriers to use clear and non-misleading surcharge descriptions, the proposed obligation to segregate surcharges, and the proposed obligation to require disclosure of surcharges at the point of sale. Only by ignoring this basic framework based upon the AVC, can the AGs assert that surcharges are inherently confusing. Indeed, this statement is directly contradictory to the position taken by 32 state attorneys general in the AVC. The AGs never explain how carriers, who operate under term contracts,

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74 NA*SUCA Declaratory Order*, 20 FCC Rcd 6448 at ¶ 23 (2005).

75 Comments of Attorneys General of the Undersigned States at 7 (June 24, 2005)("AG Comments"). Although the AGs style their pleading as "Comments," it is clear that they want the FCC to "reconsider" its *NASUCA Declaratory Order.*

76 *Id.* at 5.

would recover costs imposed by governments during the term of the contract, but which are not directly imposed on customers. Finally, the AG position would contravene the First Amendment, which prohibits governments from censoring carrier speech that advises customers of the portion of their bill caused directly by taxes, fees or other government mandates.

A. The AG Argument Is Inconsistent with the Premises of the AVC

The AGs argue that any use of surcharges, other than those that the government requires carriers to impose directly on customers, is "inherently confusing and misleading."[77] According to the AG Comments, carrier "add-on" surcharges cause "widespread confusion" among consumers and make it "virtually impossible for consumers to compare prices among providers," because any surcharge has "the effect of obfuscating the total price to be paid by the consumer."[78] The AGs additionally claim that the wireless carrier industry in particular has engaged in this "deceptive practice" since 1999, when the FCC released its *First Truth-in-Billing Order.*[79]

These arguments ignore the fact that the Commission has already held surcharges to be entirely lawful and are indeed a common form of billing structure. These sweeping allegations are also directly contrary to the AGs position in negotiating the AVC with wireless carriers. The AG Comments assume that wireless carriers will violate both the prohibition against misleading billing descriptions, the AVC obligation to segregate mandatory and non-mandatory charges and the AVC requirement of disclosure at point of sale. If one assumes these violations occur, then "widespread confusion is inevitable." This is, of course, an entirely circular argument.

77 AG Comments at 5.

78 *Id.* at 1 and 7.

79 *See id.* at 2.

At the time the AVC was negotiated, the AGs asserted that this framework addressed the concerns of customer confusion. The statement of one of the lead AGs, as documented above, is representative of the views of other participating AGs:

> Millions of Verizon Wireless, Cingular Wireless and Sprint PCS customers will be provided with complete and accurate information necessary to make an informed choice about which plan best suits their needs.[80]

The AGs in their comments never explain why the AVC provisions that were adequate in 2004 to inform consumers and enable them to comparison-shop suddenly became inadequate in 2005. Nor do the AGs explain why they would have agreed to the terms of the AVC if they truly believed that any "add-on" surcharges are inherently deceptive and misleading. Certainly, the AGs would not have settled their differences with wireless carriers by permitting wireless carriers to continue to engage in activity that the AGs now assert constitutes a "deceptive practice."

B. THE AG ARGUMENT IS NOT SUPPORTED BY THE FACTS

The limited facts that the AGs cite do not support the relief they seek. The AGs principally rely on the number of complaints filed before different governmental agencies. But relying on the number of complaints identified ignores their relative size to an industry that has doubled the number of customers within the last few years. Consider the following:

- The AGs state that telecommunications services made the FTC's 2004 "top ten list of consumer fraud-related complaints."[81] However, the AGs neglect to mention that the FTC received last year 14,276 "telephone services"-related complaints, which constituted two percent (2%) of all complaints that the FTC recorded in this study.[82] These complaints were for both regulated local ex-

[80] Illinois Attorney General Press Release, *Verizon Wireless, Cingular Wireless and Sprint PCS Agree to More Accurate Maps, Pro-Consumer Return Policies* (July 21, 2004) *See also* National Association of Attorneys General Press Release, *Settlement: Thirty-Two Attorneys General Settle with Verizon, Cingular, and Sprint PCS* (July 22, 2004).

[81] AG Comments at 2, *citing* Federal Trade Commission, *National and State Trends in Fraud & Identity Theft, January-December 2004* (Feb. 1, 2005)("FTC Report").

[82] *See* FTC Report at 5 and Appendix C.

change carriers, competitive local exchange carriers and wireless carriers. Last year, there were a total of 181 million wireless customers and 178 million LEC customers.[83]

- The AGs state that in "Texas, the Attorney General received more than 2,000 complaints about CMRS providers in 2003 and 2004."[84] However, there are over 13 million wireless customers in Texas,[85] so the receipt of 2,000 complaints means that one complaint was filed for every 6,500 customers – or a complaint rate of 0.015 percent.
- The AGs state that in "2004, the Illinois Attorney General received approximately 848 wireless complaints."[86] However, there are over 8 million wireless customers in Illinois,[87] so the receipt of 848 complaints means that one complaint was filed for every 9,400 customers – or a complaint rate of .01 percent.
- The AGs state that in "2004, . . . Oregon received approximately 300 complaints regarding the billing and disclosure practices of wireless carriers."[88] However, there are over 2 million wireless customers in Oregon.[89] So the receipt of 300 complaints means that one complaint was filed for every 6,600 customers – or a complaint rate of .015 percent.

The AGs additionally cite complaint data filed with the California Public Utilities Commission ("CPUC"). This data, however, actually undercuts their argument that new regulation would decrease the number of complaints filed. The AGs state:

> [I]n California, the [CPUC] received approximately 130,000 total telecommunications-related complaints between 2000 and 2004 (more than 30,000 such complaints were made in 2004 alone), with CMRS-related complaints growing to nearly a third of that number.[90]

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83 *See* FCC Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2004,* Tables 1 and 13 (July 2005)("23004 Local Competition Report").

84 AG Comments at 3.

85 *See* 2004 Local Competition Report at Table 13.

86 AG Comments at 3.

87 *See* 2004 Local Competition Report at Table 13.

88 AG Comments at 3.

89 *See* 2004 Local Competition Report at Table 13.

90 AG Comments at 3.

Assuming that California has the same customer profile as the rest of the country, wireless customers outnumber landline customers in the State.[91] Accordingly, the AG's statistic demonstrates that wireless complaints are significantly lower than those for wireline companies, which the CPUC regulates extensively. If regulation was effective in minimizing the number of customer complaints, one would expect the number of wireless complaints to exceed the number of landline complaints. Instead, the California complaint rate against heavily regulated LECs appears to be more than three times the rate of competitive wireless carriers.[92] Obviously, this "fact" does not support the AGs proposal that the FCC adopt more rules for competitive carriers.

While Sprint acknowledges that there have been issues in the past regarding wireless billing practices, these issues are being addressed through the marketplace. Indeed, Sprint developed an entirely new billing structure, called "Fair and Flexible," to address its customers' concerns about wireless pricing and overages. Wireless carriers are working in the market to capitalize on the mistakes of their competitors to the benefit of consumers. With 182 million customers, however, some number of complaints is inevitable and indeed, it would be impossible to develop rate plans and billing structures that satisfied every consumer. There is no assurance that the rules proposed by NASUCA and the AGs would reduce complaint levels.

Finally, the AGs provide no evidence that the complaints they cite involved surcharges as opposed to other carrier practices. The AGs assert that "[a]t the heart of much of much consumer confusion and related complaints is the carriers' practice of incorporating carrier add-on

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91 *See, "Local Telephone Competition: Status as of December 31, 2004"* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (released July 8, 2005); AARP Comments at 2.

92 It is also worth noting that prior to the rate deregulation of 1993, California had the highest cell phone rates in the country.

charges as line items to bills."[93] Yet, with regard to the minimal complaint data they recite, the AGs do not identify what number (or percentage) involve complaints over carrier "add-on" surcharges. For example, the AGs have relied upon the 14,276 "telephone services" related complaints that the FTC received in 2004. However, the FTC has described these complaints as involving "[c]harges for calls to 'toll-free' numbers; unauthorized charges such as charges for calls you didn't make; unauthorized switching of your phone service provider; misleading pre-paid phone card offers, etc."[94] It is thus not apparent what number of these complaints involved surcharges.[95] Verizon does track this level of detail, and "only 0.85% of the complaints recorded in 2004 related to taxes and surcharges.[96]

The Administrative Procedures Act requires that the Commission conclusions be supported by "substantial evidence" in the administrative record.[97] Appellate courts "shall . . . set aside" Commission decisions if they are "arbitrary, capricious, an abuse of discretion" or "unsupported by substantial evidence."[98] In this regard, appellate courts have held that an agency is

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93 AG Comments at 3.

94 *Id.* at Appendix B.

95 The AGs similarly refer to and reply upon the "telecommunications-related complaints" filed with their offices. AG Comments at 2-3. However, they neither identify the total number of such complaints, nor separately break down the number (or percentage) that relate to surcharges as opposed to other issues.

96 Verizon Comments at 6.

97 5 U.S.C. § 706(2)(E). As used in the APA, "substantial evidence" means "the amount of evidence constituting 'enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn . . . is one of fact for the jury.'" *Kay* v. *FCC,* 396 F.3d 1184, 1188 (D.C. Cir. 2005)(supporting citations omitted).

98 5 U.S.C. § 706(2)(E).

"not 'entitled merely to assume' that the practices it seeks to regulate cause the harm it fears."[99] Clearly, the AGs have not supported the relief they seek with the "facts" they have recited.

C. Neither the ACC nor AGs Explain How Carriers Should Recover Costs Imposed by Government

The Attorneys General never explain how competitive carriers should recover the costs that the government imposes on them if carriers are prohibited from using line item surcharges. Ultimately carriers must recover their costs, including government imposed costs, from their customers. The elimination of surcharges merely creates inequities in the manner in which these costs are recovered and restricts options for customers. [100]

Governments impose two types of costs on carriers which increase the total price for service that customers pay. One category involves taxes and fees, which are the sums that a carrier must remit directly to the government. Carriers have no control over the size of these government-imposed costs; their size is rather determined solely by the government. Importantly, the only way that carriers can pay these taxes and fees is through revenues generated by their customers. Thus, it makes no practical difference whether the government dictates the method of recovery – namely, whether the government requires carriers to collect the taxes directly from customers or gives carriers the flexibility to collect the taxes either directly *via* surcharges or hide them in the overall cost of service. The important point rather is that a carrier must generate sufficient revenues from its customers to cover its costs of operations (plus a profit) *and* generate

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99 *Blount* v. *SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995), *citing Tex Tin Corp.* v. *EPA,* 992 F.2d 353, 356 (D.C. Cir. 1993).

100 The ACC Comments demonstrate a fundamental misunderstanding of the manner in which wireless phone rates are established. ACC argues that a "rate element" is part of a ratemaking process, and since the surcharges in question are not part of a "ratemaking process," they are billing issues, not rates. The ACC seems oblivious to the fact that competitive carriers are not subject to rate proceedings at which their costs are analyzed and their rates established by a regulatory body. ACC Comments at 4.

additional revenues to remit to the government its taxes – regardless of whether the government classifies these taxes as "mandatory" or "discretionary."

The second category of government-imposed costs involves government mandates, such as number portability or pooling, which require carriers to undertake specified activity that imposes both capital and operating expense. The costs associated with these mandates are not remitted to the government, but the fact remains that the government is the direct cause of these costs. Again, the only way that a carrier can comply with government mandates is by raising sufficient revenue from customers to cover the mandate's implementation and compliance costs.

Competitive carriers are not guaranteed profits sufficient to recover the costs the government imposes on them, especially if they use term contracts with their subscribers. With a term contract, the carrier and customer agree to a fixed price during the term of the contract. Thus, if the government imposes a new cost on the carrier during the term of a particular contract, the carrier is precluded by the contract from increasing its prices – unless the contract includes a provision that permits the carrier to impose surcharges in specified circumstances.

Carriers that utilize term contracts in their relations with customers would have two alternatives if the government prohibits them from using line item surcharges in recovering government-imposed costs:

1. A carrier could increase the "base" service price charged to new customers. But it does not seem equitable that only a subset of all customers (*i.e.,* new customers) should pay the full cost of a new government-imposed cost. In addition, given that new customers comprise only a small fraction of a carrier's total customer base, new customers would be required to pay significantly higher rates than existing customers if a carrier is to recover its costs for a major government mandate, such as CALEA, E911 or LNP. In fact, service could become prohibitively expensive if, for example, a carrier is required to pay a State five percent of its revenues but collect that sum from new customers only.

2. Alternatively, to address the equity issue between new and existing customers, a carrier could stop using term contracts altogether by converting all service offerings to month-to-month arrangements. With this approach, both new and existing customers would pay the same rate, although this rate would change as taxes/fees/mandates increase or decrease.

Although the AGs may prefer that carriers discontinue the use of term plans, the American consumer has made clear that they prefer economic advantages of term contract plans to more flexible month-to-month plans, with over 90 percent of wireless customers choosing a contract plan. They prefer contract plans because of the benefits such plans provide, including lower prices (a carrier can offer lower rates for handsets, for example, if it knows that it can recover its subsidy costs over time). Such contracts, in turn, permit carriers to better plan for network investment and other long term capital expenditures. Sprint believes that millions of wireless customers would be very unhappy – and would file complaints – if wireless carriers withdrew their contract plans and forced everyone to month-to-month arrangements, where the price would change on a regular basis.

Moreover, the AG's preferred approach would require that a wireless carrier seeking to maintain national plans and national prices would be required to bundle all government imposed fees, *e.g.,* USF charges and gross receipts taxes, into the national service price, effectively engaging in a voluntary form of rate averaging.[101] However, there are wide variations in such taxes and fees between the various states. Thus, to charge the same price in all jurisdictions necessarily would mean that some customers (those residing in States with no state USF or gross receipts taxes) would pay higher rates than they otherwise would have paid, because they would effec-

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101 The AG analogy to the sale automobiles (*see* Comments at 6-7) is both inapt and factually incorrect. The purchase of a product at one point in time is not at all like the purchase of a service over a period of a year or two. Moreover, a review of the typical automobile "invoice" shows multiple line items and surcharges such as "dealer prep," "advertising," "processing" and "transport" charges.

tively be subsidizing the costs imposed by governments in different jurisdictions. And this "cross-jurisdiction subsidy" impact, the Commission has recognized, would simply encourage more governments to increase their taxation of the telecommunications industry:

> [W]ere AT&T not to flow through the gross receipts tax, states would have an incentive to target telecommunications carriers for specific tax burdens and thereby export the cost of the tax to customers in other states, who do not directly benefit from, and who do not have the ability to influence the imposition of, this tax.[102]

The alternative would be for carriers to charge a different "base" rate in each jurisdiction that imposes different taxes and fees. In States that permit local taxation (*e.g.,* city sales tax, county sales tax, local E911 fees), each carrier would be required to impose a different "base" rate in each locality. Indeed, given that some localities have different taxes or tax rates for telecommunications as opposed to non-telecommunications services, a carrier may be required to offer multiple "base" rates in the same locality, based on the particular mix of services that the customer purchases. Of course, national pricing for national plans could no longer be sustained under such an approach.

One point must be understood – namely, the Commission cannot reasonably expect any carrier to simply absorb the costs of new taxes, fees or regulatory mandates. Profit margins for all competitive telecommunications providers are extremely small. With respect to some wireless carriers, for example, profits still remain elusive.[103] Wireless service is capital intensive, requiring continuing tower construction, switch upgrades, handset upgrades, software modifications and transport facility construction. If Sprint or any other carrier was required to absorb net

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[102] *Connecticut Office of Consumer Counsel* v. *AT&T,* 4 FCC Rcd 8130, 8132 ¶ 16 (1989). In fact, an AT&T-commissioned Ernst & Young study found that the telecommunications industry pays local and stdate taxes at a rate 2.5 percent higher than the average rate for other industries. *See* COMMUNICATIONS DAILY (July 20, 2005).

[103] *See* THE WALL STREET JOURNAL, *Cingular Wireless Profit Falls Over 50% on AT&T Merger*, at D4 (July 21, 2005).

taxes, fees or mandates, its only practical alternative would be to reduce capital investment – meaning that deployment of new technologies and services would be slowed, expansion of service to underserved areas would be slowed, expansion of capacity to meet growing customer usage would be slowed and quality of service would be reduced, all to the detriment of consumers.

D. THERE ARE SIGNIFICANT FIRST AMENDMENT ISSUES WITH THE AG POSITION

The Attorneys General do not oppose line item surcharges for "taxes and regulatory fees," which they define as fees that carriers "remit" directly to the governmental entity imposing the tax or fee.[104] However, the AGs do oppose "carrier add-on charges," even though carriers also remit some of the resulting revenues directly to the government as well.[105] The difference between the two categories of surcharges is whether the taxing authority "require[s] carriers to collect [the tax] from customers."[106] In other words, according to the AGs, it should be the government that decides whether customers are told of the incremental costs that the government adds to the total cost of the service which the customers purchase. Under the AGs approach, governments could hide their taxes, fees and regulatory mandates from the customers who pay the sums simply by giving carriers the "discretion" to collect the sums directly (in the form a surcharge) or indirectly (as part of the overall cost of service).

Any FCC rule that prohibits carriers from telling their customers of the costs government imposes on their service would constitute censorship and plainly contravene the First Amend-

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104 *See* AG Comment at 1.

105 *See id.*

106 *Id.*

ment. As the Supreme Court has held, "speech prohibitions of this type rarely survive constitutional review."[107]

The AGs assume that the speech involved in their "ban surcharges" proposal involves commercial speech only:

> [T]he regulation advocated here does nothing more than prohibit misrepresentation in commercial speech, which is not constitutionally protected.[108]

But misrepresentation has nothing to do with the AGs proposal that the FCC prohibit carriers from telling customers of the costs that the government adds to their service prices – unless the FCC believes that advising customers of taxes, fees and other costs of regulation itself constitutes misrepresentation.[109]

Although the issues involving language on a telephone bill, at first blush, might be appear purely commercial, the speech at issue here does "more than propose a commercial transaction."[110] Rather, the speech at issue – brief descriptions of the amounts of taxes and fees paid to the government and the costs of certain government regulation – attempt to identify to the customer the cause and intended use of these charges. As former Commissioner Furchgott-Roth has observed, a proposal such as the one being suggested by the AGs involves "censorship of speech integrally related to a political dispute over social policy and taxation":

> Line items for new taxes are a means of letting customers understand why rates are not lower than they would have been absent the new taxes. . . . For consum-

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107 *44 Liquormart* v. *Rhode Island*, 516 U.S. 474, 504 (1996).

108 AG Comments at 8.

109 *But see* Dissenting Statement Commissioner Furchgott-Roth, *First Truth-in-Billing Order,* 14 FCC Rcd at 7575 ("Only in Washington could explicit disclosure of this new tax be considered deceptive.").

110 *Pittsburgh Press* v. *Human Relations Comm'n*, 413 U.S. 376, 385 (1973).

ers, the issue is not just whether prices have gone up or down. The question is whether prices would have been lower without the new tax.[111]

The speech at issue also directly relates to government accountability. Governments cannot be held accountable for their actions – whether imposing a new tax, fee or regulation – if the persons who pay these sums are unaware of the tax, fee or regulation. As the Supreme Court has held, these subjects "extend well beyond speech that proposes a business transaction . . . and includes the kind of discussion of 'matters of public concern'' that the First Amendment both fully protects and implicitly encourages."[112] In fact, "[t]here is no question that speech critical of the exercise of the [government's] power lies at the very center of the First Amendment."[113]

The Supreme Court has struck down on First Amendment grounds government bans on advertisements containing alcohol prices and prescription drugs,[114] and bans on brewers telling customers of the alcoholic content of their malt beverages.[115] An FCC rule censoring carriers from advising customers of the amount of government taxes and fees and the cost of government regulation could not withstand First Amendment scrutiny. It is inconceivable that courts would permit, for example, the FCC to hide universal service "contributions" that now regularly exceed 10 percent of interstate revenues.

One of the Commission's core Truth-in-Billing principles is that telephone bills should be "full and non-misleading."[116] A Commission rule prohibiting carriers from disclosing to cus-

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111 Dissenting Statement Commissioner Furchgott-Roth, *First Truth-in-Billing Order,* 14 FCC Rcd at 7575.

112 *Pacific Electric & Gas* v. *California,* 475 U.S. 1, 8 (1986)(internal citations omitted).

113 Gentile v. Nevada, 501 U.S. 1030, 1033 (1991).

114 *44 Liquormart* v. *Rhode Island*, 516, U.S. 474 (1996); *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

115 *Rubin* v. *Coors Brewing*, 514 U.S. 476 (1995).

116 *First Truth-in-Billing Order,* 14 FCC Rcd 7492, 7516 ¶ 37 (1999).

tomers that amount of their service price that is either paid directly to the government or recovers the cost of government mandates cannot credibly be characterized as "full and non-misleading."

Current service plans have been developed in response to market demands. This market-based approach to pricing has been extraordinarily successful, with Chairman Martin describing it as "an amazing story."[117] The Commission should continue to allow the market to drive customer service. The existing rules, along with the additions described above, provide the FCC ample leverage to protect consumers without threatening the wireless success story.

IV. CONCLUSION

For the foregoing reasons, Sprint Corporation respectfully requests that the Commission establish a national framework for telecommunications billing, preempt all State billing and disclosure laws and reject the request of the Attorneys General and the ACC to reconsider its decision that carriers may use non-misleading line item surcharges.

Respectfully submitted,

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117 Martin Dow Lohnes Presentation at 1.